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No. 20,619

United States Court of Appeals
For the Ninth Circuit

HELEN FONG, also known as HELEN
POY, also known as FONG HONG MAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States
District Court for the Northern
District of California

BRIEF FOR THE APPELLEE

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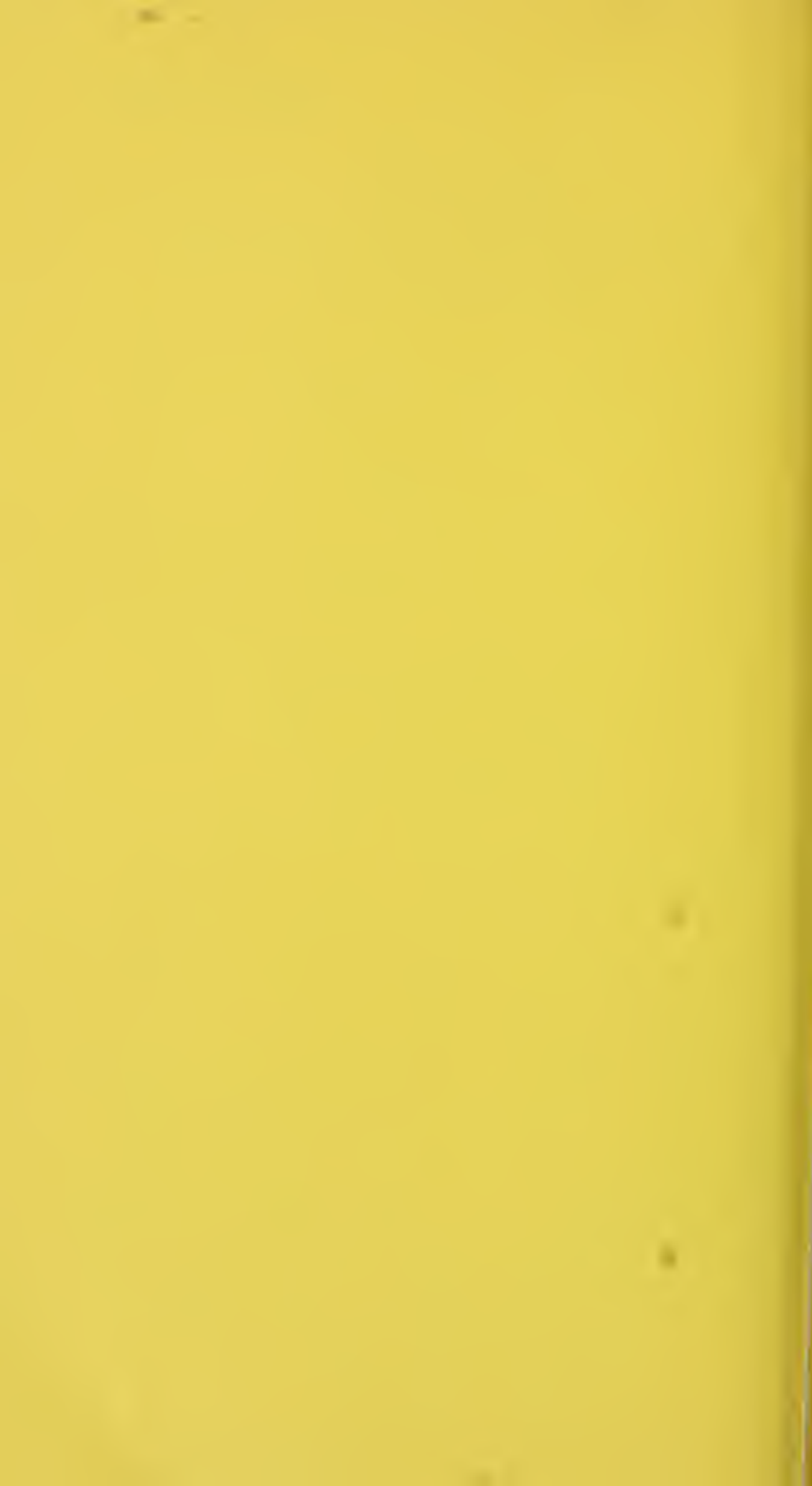
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BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 46-47) are not officially reported.

JURISDICTION

This appeal involves federal income taxes. The taxable years and the taxpayers involved,¹ the dates

¹As discussed in more detail, *infra*, Helen Fong, also known as Helen Poy, also known as Fong Hong May (hereinafter referred to as the appellant), pursuant to a final court decree of divorce, was awarded certain community property subject to any unpaid income tax liabilities of her own and her husband, Fong Poy, for the years 1931 through 1946, inclusive. (R. 42.) The claims for refund in issue arose as a result of payments made by the appellant with regard to her own, Fong Poy's, and joint tax obligations for certain of these years. The claims were made by the appellant alone since she made the payments, and the instant action was brought by the appellant (without the joinder of Fong Poy) for the same reason.

of filing of refund claims and the amounts of these claims, the dates these claims were disallowed, and the dates on which the amounts claimed (as well as other amounts paid for the respective years) were paid are as follows:

taxable Year	Taxpayer	Date of Refund Claim	Amount of Refund Claim	Date Refund Claim Disallowed	Payment Dates of Claimed Amounts	R
39	Fong Poy and Appellant	1-29-62	\$ 1,785.99	5-8-62	12-29-59; 2-4-60; 12-28-60	
40	Fong Poy and Appellant	1-29-62	3,693.78	5-8-62	12-29-59; 8-30-60; 3-24-61	
41	Fong Poy and Appellant	1-29-62	1,827.98	5-8-62	3-16-42; 12-29-59; 2-4-60; 3-24-61	
42	Fong Poy	12-27-61	10,404.26	5-8-62	3-15-43; 6-15-43; 12-29-59; 2-4-60; 8-30-60; 3-24-61; 12-27-61	
43	Appellant	1-29-62	349.81	5-8-62	9-4-59; 2-4-60; 9-6-61	
43	Fong Poy	3-22-62	5,629.64	5-8-62	9-4-59; 8-30-60; 2-19-62	
44	Fong Poy	12-27-61	5,410.00	5-8-62	3-15-45; 4-15-59; 12-29-59; 8-30-60	
44	Appellant	2-13-63	1,532.25	8-13-63	9-4-59; 9-6-61; 3-4-62; 12-27-62	
45	Fong Poy	12-27-61	5,490.92	5-8-62	3-15-46; 12-29-59; 8-30-60; 3-4-61; 12-27-61	
46	Appellant	2-13-63	258.21	8-13-63	9-4-59; 10-10-61; 12-27-62	
46	Fong Poy	2-13-63	4,090.17	²	3-15-47; 9-4-59; 12-29-60; 8-30-60; 3-24-61; 2-19-62; 3-19-62; 12-27-62	

²More than six months elapsed without the claim being allowed or disallowed prior to the institution of this action.

Within the time provided in Section 3772 of the Internal Revenue Code of 1939, on May 5, 1964, the appellant brought this action in the District Court for recovery of the amounts paid. (R. 1-12.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on August 13, 1965. (R. 48.) Within sixty days thereafter, on September 13, 1965, a notice of appeal was filed. (R. 49.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether, under the Internal Revenue Code of 1939, delinquency interest is payable upon that portion of a jeopardy assessment representing interest upon the tax deficiency, from the date of notice of the jeopardy assessment to the date of payment of the assessed deficiency interest, notwithstanding a review and re-determination of the assessed tax deficiency by the Tax Court.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*.

STATEMENT

The facts as stipulated by counsel (R. 39-45) and adopted by the District Court in its findings of fact (R. 47) may be stated as follows:

On August 31, 1951, the Commissioner of Internal Revenue caused joint and individual jeopardy assessments to be made against Fong Poy and the appellant, who were then husband and wife, with respect to determined deficiencies in federal income taxes, together with interest and penalties, for the taxable years and in the amounts set forth in the following schedule (R. 40-41):

<u>Taxable Year</u>	<u>Taxpayer</u>	<u>Tax Deficiency</u>	<u>Interest on Deficiency</u>	<u>Penalty [Sec. 293(b), I.R.C. of 1939]</u>	<u>Tot Assess</u>
1939	Fong Poy and Appellant	\$ 17,114.50	\$ 11,768.45	\$ 8,557.25	\$ 37,440.20
1940	Fong Poy and Appellant	11,998.67	7,530.73	5,999.34	25,528.74
1941	Fong Poy and Appellant	7,652.39	4,343.73	3,826.20	15,822.32
1942	Fong Poy	41,991.93	21,316.37	20,995.97	84,304.27
1943	Appellant	1,628.07	728.77	None	2,356.84
1943	Fong Poy	26,202.67	11,729.10	13,101.34	51,033.11
1944	Fong Poy	169,252.92	65,607.53	84,626.46	319,486.91
1944	Appellant	8,235.07	3,192.16	None	11,427.23
1945	Fong Poy	79,188.11	25,944.41	39,594.06	144,726.58
1946	Appellant	2,009.96	537.93	None	2,547.89
1946	Fong Poy	83,707.81	22,402.73	41,853.91	147,964.45

On September 4, 1951, notice and demand for payment of the jeopardy assessments were served upon

the appellant and Fong Poy. No bond to stay collection of the jeopardy assessments was ever filed by or on behalf of either the appellant or Fong Poy. (R. 41.)

The appellant and Fong Poy, after September 4, 1951, jointly and individually filed timely petitions with the Tax Court seeking redeterminations of the assessed deficiencies determined by the Commissioner. During the period in which their petitions were pending in the Tax Court, the appellant and Fong Poy were divorced by a final court decree entered on March 11, 1959, whereunder the appellant was awarded all the community real property subject to any unpaid income tax liabilities of the appellant and Fong Poy for the years 1931 through 1946, inclusive, including the above-described jeopardy assessments. No payments were made on these assessments by Fong Poy or the appellant during their marriage. Thereafter, from time to time, the appellant made payments of substantial sums for application upon the jeopardy assessment accounts. (R. 41-42.)

On January 9 and 10, 1961, final decisions were entered by the Tax Court, pursuant to stipulations entered into between counsel in those proceedings, redetermining the tax deficiencies and penalties which had been assessed on August 31, 1951. (R. 42.) The deficiencies and penalties for each of the taxable years involved as finally redetermined by the Tax Court were as follows (R. 43):

<u>Taxable Year</u>	<u>Taxpayer</u>	<u>Tax Deficiency</u>	<u>Penalty [Sec. 293(b), I.R.C. of 1939]</u>
1939	Fong Poy and Appellant	\$ 5,204.00	\$ 2,602.00
1940	Fong Poy and Appellant	10,898.67	5,449.34
1941	Fong Poy and Appellant	6,452.39	3,226.20
1942	Fong Poy	41,065.43	20,489.11
1943	Appellant	46,866.36	None
1943	Fong Poy	32,909.38	16,476.49
1944	Fong Poy	30,552.97	15,276.49
1944	Appellant	31,902.31	None
1945	Fong Poy	33,579.48	16,789.75
1946	Appellant	39,963.24	None
1946	Fong Poy	31,893.48	15,919.74

The Tax Court made no decision as to the amount of interest assessable and payable upon the redetermined tax deficiencies and penalties. (R. 43.)

After the entry of the Tax Court decisions, the accounts created at the time of the jeopardy assessments were adjusted pursuant to the Tax Court's redeterminations. Interest which was assessable on the tax deficiencies as finally redetermined by the Tax Court was recomputed from the date the tax was originally due to be paid to August 31, 1951, the date of the jeopardy assessments. Interest was then computed upon the redetermined jeopardy assessments, which interest was computed as accruing from September 4, 1951 (the date notice and demand for payment were given with respect to the jeopardy assessments), to the dates payments were credited against the assessed

balances in each account. For example, with respect to those portions of the redetermined jeopardy assessments which represented assessed interest on the tax deficiencies, interest was computed to accrue from the date of notice and demand for payment to the dates on which credits were made to satisfy in full such portion of each assessment representing assessed deficiency interest. Thus, delinquency interest was charged and collected from the appellant upon the deficiency interest which comprised a part of the redetermined jeopardy assessments. (R. 43-44.)

The appellant filed claims for refund for amounts paid by her for the delinquency interest charged and paid with respect to the assessed deficiency interest. These claims were disallowed, and this action was commenced in the District Court. (R. 44.) The District Court concluded (R. 47) that all interest charged and collected by the Government from the appellant was properly and legally charged and collected. Judgment was entered dismissing the appellant's complaint with prejudice. (R. 48.)

SUMMARY OF ARGUMENT

Pursuant to Sections 273 and 292(a) of the Internal Revenue Code of 1939, jeopardy assessments, which included interest to date on the tax deficiencies assessed, were made against the appellant. The appellant posted no bond to stay collection of the assessed amounts, and did not pay these amounts within ten days from the date of notice and demand for payment. Section 294(b) provides that "Where a de-

iciency, or any interest or additional amounts assessed in connection therewith * * *, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid." Pursuant to Section 294(b), the appellant was charged with delinquency interest on the assessed amounts (including the deficiency interest) from the date of the notice and demand for payment until the assessed amounts were paid. The District Court's conclusion that delinquency interest was properly charged and collected with respect to the assessed deficiency interest, notwithstanding that the delinquency interest was charged for the period while petitions for redeterminations of the assessed deficiencies were pending in the Tax Court, is in accord with the statute and the controlling decisions.

The appellant's arguments directed at Section 297 of the 1939 Code are inapplicable to the instant case, since that section applies only in jeopardy assessment cases where a bond has been filed to stay collection of the assessed amounts. Furthermore, even if Section 297 were applicable under the facts of the instant case, the appellant would have been liable for delinquency interest on the assessed deficiency interest in the amount in issue.

ARGUMENT

THE INTERNAL REVENUE CODE OF 1939 REQUIRES THE COLLECTION OF DELINQUENCY INTEREST UPON INTEREST ASSESSED AS A PART OF A JEOPARDY ASSESSMENT WHERE SUCH ASSESSMENT IS NOT PAID WITHIN TEN DAYS AFTER NOTICE AND DEMAND, IRRESPECTIVE OF TAX COURT REVIEW OF THE UNDERLYING TAX DEFICIENCIES

A. Introduction

This litigation presents the question whether the Government was correct under the Internal Revenue Code of 1939 in collecting what is commonly referred to as “delinquency interest” upon “deficiency interest”—the deficiency interest having been assessed under jeopardy assessment procedures together with the tax deficiencies (and ultimately adjusted in conformance with the Tax Court’s redeterminations of the tax deficiencies), and the delinquency interest having been computed and collected on the adjusted deficiency interest for the period from the date of notice and demand for payment of the jeopardy assessments to the dates on which payments satisfying the assessed deficiency interest were made. The appellant, while recognizing that delinquency interest may be collected with respect to assessed deficiency interest in certain circumstances, contends (Br. 10) that the collection of delinquency interest upon deficiency interest, for the period during which petitions for redeterminations of the assessed deficiencies were pending in the Tax Court, was erroneous. She suggests (Br. 15) that it may even have been unconstitutional. We submit that the imposition and collection of delinquency interest

upon assessed deficiency interest in jeopardy cases under the 1939 Code, irrespective of Tax Court review of the underlying tax deficiencies, is a legal and constitutional statutory exaction under the interest provisions of that statute as enacted by Congress and as interpreted by the courts where (as here) payment is not made within ten days from the notice and demand for payment of the jeopardy assessments. Indeed, this case is not distinguishable in any material aspect from *Ginsburg v. United States*, 278 F. 2d 470 (C.A. 1st), rehearing denied, 278 F. 2d 473, certiorari denied, 364 U.S. 878, where essentially the same arguments as are made by the appellant here were rejected.

The issue in the instant case cannot arise with respect to years governed by the Internal Revenue Code of 1954, as Section 6601(f)(2) (26 U.S.C. 1958 ed., Sec. 6601) specifically bars the collection of interest on interest. In commenting on Section 6601(f)(2) prior to the passage of the 1954 Code, both the House and Senate Committees used the following identical language in stating what the law was under the 1939 Code (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A417 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4565); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 589 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5238)):

Under the provisions of this section, there is no interest on interest. Under existing law, in the case of deficiencies in income, estate or gift taxes, interest runs from the date prescribed for payment of the tax to the date of assessment of the deficiency and then interest on the amount assessed runs from the date of assessment.

There is no question in this case (as the appellant recognizes (Br. 4)) that the applicable statute is the Internal Revenue Code of 1939, the liabilities in question having arisen during years governed by that Code. See Internal Revenue Code of 1954, Sec. 7851 (a)(6) and (b)(1) (26 U.S.C. 1958 ed., Sec. 7851); *Ginsburg v. United States*, *supra*; *Ingannamorte v. United States*, 189 F. Supp. 341 (N.J.); Rev. Rul. 54-426, 1954-2 Cum. Bull. 39.

- B. If a taxpayer fails to post a bond to stay collection of a jeopardy assessment, Section 294(b) of the 1939 Code authorizes the collection of delinquency interest on assessed deficiency interest irrespective of Tax Court review of the underlying tax deficiency, where the assessed deficiency interest is not paid within ten days from the giving of notice and demand for payment

Section 273(a) of the Internal Revenue Code of 1939,³ Appendix, *infra*, authorizes the Commissioner to make a jeopardy assessment if he believes that delay will seriously hamper collection of a deficiency determined by him.⁴ This section requires him to "im-

³Hereinafter, references to the Internal Revenue Code are to the 1939 Code, unless otherwise specified.

⁴No claim is or can be made by the appellant that the Commissioner abused his statutory authority in making the jeopardy assessments on which the interest in question was computed. The appellant recognizes (Br. 7) that the Commissioner's belief that there is a clear and present danger that a deficiency will be jeopardized by delay is not subject to judicial review. *Field v. United States*, 263 F. 2d 758 (C.A. 5th); *Lloyd v. Patterson*, 242 F. 2d 742 (C.A. 5th); *Veeder v. Commissioner*, 36 F. 2d 342 (C.A. 7th); *Foundation Co. v. United States*, 15 F. Supp. 229 (Ct. Cl.). The jeopardy assessment is in fact used primarily in cases in which fraud has been determined to be an element of the tax deficiency, as in the instant case. The procedures followed within the Internal Revenue Service in each case require a thorough review of the determination of jeopardy before a jeopardy assessment is made. See Rev. Proc. 60-4, 1960-1 Cum. Bull. 877.

mediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law)." See Section 292(a), Appendix, *infra*. If the taxpayer wishes to stay the immediate collection of the amount of the assessment pending final redetermination by the Tax Court of the actual amount owing, Section 273(f), Appendix, *infra*, requires him to file a bond. In the instant case, the Commissioner made joint and individual jeopardy assessments against the appellant and Fong Poy, her former husband. The jeopardy assessments were composed of (1) the basic tax deficiencies, (2) interest on the tax deficiencies, and (3) fraud penalties. No bond was posted to stay collection of the assessed amounts.

Section 294(b), Appendix, *infra*, provides that "Where a deficiency, or any interest or additional amounts assessed in connection therewith * * *, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid." The delinquency interest on the assessed deficiency interest in issue in the instant case was imposed pursuant to this provision, as the assessed deficiency interest was not paid within ten days from the date of notice and demand for payment. The fact that the appellant and Fong Poy filed petitions with the Tax Court seeking redeterminations of the assessed deficiencies (as provided in Section 272(a)(1), Appendix, *infra*) did not

alter the right of the Government to be paid interest upon the assessed amounts under Section 294(b). In this connection, it is to be noted that the interest provided for in Section 294(b) is not a penalty, as the appellant regards it, but is compensation for the use of money exacted because of delay in payment of tax. See *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561; *United States v. Childs*, 266 U.S. 304; *Hastings & Co. v. Smith*, 224 F. 2d 875 (C.A. 3d); *Owens v. Commissioner*, 125 F. 2d 210 (C.A. 10th), certiorari denied, 316 U.S. 704, rehearing denied, 317 U.S. 704; Rev. Rul. 55-22, 1955-1 Cum. Bull. 198.

The leading decision on the precise issue involved in the present case was rendered in 1960 by the Court of Appeals for the First Circuit in *Ginsburg v. United States*, *supra*. The taxpayer had filed no bond after jeopardy assessments were made against him, had petitioned for Tax Court review, and then later complained in the District Court that delinquency interest on deficiency interest had been collected from him for the period from the date of notice of the jeopardy assessments to the date of payment, notwithstanding Tax Court review. The First Circuit held (as we contend here) that delinquency interest on deficiency interest was correctly imposed under the 1939 Code in the no-bond jeopardy case by virtue of Section 294(b). The court considered and rejected the taxpayer's argument that the imposition of such compounded interest in jeopardy cases was discriminatory and amounted to a penalty. Accord, *Erickson v. United States*, 309 F. 2d 760 (Ct. Cl.); *Silver v. United*

States, 202 F. Supp. 1 (N.D. N.Y.); *United States v. Miyamoto* (Hawaii), decided March 11, 1960 (60-1 U.S.T.C., par. 9366); *Grimsley v. Patterson*, 183 F. Supp. 729 (N.D. Ala.); *Symonides v. Crenshaw* (E.D. Va.), decided October 27, 1953 (53-2 U.S.T.C., par. 9639); 10 Mertens, Law of Federal Income Taxation (Zimet Rev.), Sec. 55.07. Contra, *Crolich v. United States*, 144 F. Supp. 109 (S.D. Ala.)

To be sure, as appellant contends (Br. 5), had there been no jeopardy assessments in this case, then the tax deficiencies, fraud penalties and interest on the tax deficiencies would have been assessed after the Tax Court decisions had become final. Section 272(a)(1). If these amounts had been assessed at that time, and if the amounts had not been paid within ten days from the date of notice of the assessments, then delinquency interest would have accrued on the unpaid amounts of the assessments (including the assessed deficiency interest) from the date of notice until the amounts had been paid in full. Section 294(b). Since the assessments would have been made subsequent to the Tax Court redeterminations of the deficiencies, delinquency interest would not have been imposed on deficiency interest during the pendency of the Tax Court litigation.

In the instant case, however, because the jeopardy assessments preceded the Tax Court litigation, imposition of delinquency interest upon assessed deficiency interest during the pendency of the Tax Court litigation was required by Section 294(b), since the deficiency interest was not paid within ten days from

the notice and demand for payment. As stated by the First Circuit in *Ginsburg v. United States, supra*, p. 473:

It having been properly determined that payment is to be made, the imposition of "delinquency" interest thereafter on the total amount assessed is a normal consequence of non-payment, and one that is uniformly applied throughout the statute. There being no valid objection to the dog, there can be none to the fact that like all others, he has a tail.

The appellant contends (Br. 9-10) that Section 297, Appendix, *infra*, not Section 294(b), should govern the imposition of interest after a jeopardy assessment, where the taxpayer (as in the instant case) files a petition for redetermination of the assessed deficiency with the Tax Court. She states (Br. 10) that the interest in issue herein would not have been authorized by Section 297. It is our position (1) that Section 297 is inapplicable under the facts of the instant case because no bond was filed to stay collection of the jeopardy assessment, and (2) that the appellant would have been liable for delinquency interest on the assessed deficiency interest in the amount in issue herein even if Section 297 were applicable under the facts of the instant case.

As noted above, Section 273(f) requires a taxpayer who wishes to stay the immediate collection of the amount of a jeopardy assessment to file a bond pending final determination by the Tax Court of the actual amount owing. If a bond is filed, then to the

extent the assessment is sustained by the Tax Court (See Section 273(i), Appendix, *infra*), Section 297 requires the collection of interest upon the amount thus stayed by the bond, as a part of the tax, from the date of notice of the jeopardy assessment to the date of notice and demand following the decision of the Tax Court, and failing payment within ten days, further interest as a part of the tax upon the unpaid amount until paid. Section 297 says nothing with respect to a case, such as the instant one, where the taxpayer has failed to file a bond. Thus, Congress felt that there was no need to cover such situations in Section 297, since they are covered by the similar provisions of Section 294(b), which deals with interest generally upon unpaid amounts. This is evident from the provisions of Section 294(c), Appendix, *infra*, in which Congress explicitly excluded from the coverage of Section 294(b) the situation where a taxpayer failed to pay the jeopardy assessment because he had filed a bond. In such a situation, Congress provided that Section 294(b) "shall not apply to the amount covered by the bond," leaving the clear inference (as the District Court held) that Section 294(b) does apply to amounts in excess of or amounts not covered by a bond.

The appellant relies on the case of *Crolich v. United States*, *supra*. However, the decision in *Crolich* has never been followed in any other reported case and has been considered and criticized by other courts in which it has been cited. See *Ginsburg v. United States*, *supra*; *Silver v. United States*, *supra*; *Grims-*

ley v. Patterson, supra. In *Grimsley*, the District Court for the Northern District of Alabama, considering a no-bond jeopardy case with facts similar to those in *Crolich* only a year after the *Crolich* decision had been rendered in the Southern District of Alabama, cited its sister court as being in error on the applicable provisions of the Code.

Even if the appellant were correct in contending that Section 297 and not Section 294(b) should govern the matter of interest collectible in connection with a jeopardy assessment where no bond has been filed and the taxpayer petitions the Tax Court for a redetermination of the assessed deficiency, the delinquency interest collected on the assessed deficiency interest in issue herein would still have been properly charged to the appellant. The interest to be collected pursuant to Section 297 is based upon the amount redetermined by the Tax Court as the amount of the deficiency which should have been assessed, which amount is collected pursuant to Section 273(i). See also Section 273(f). The appellant emphasizes (Br. 10) that this amount redetermined by the Tax Court does not include interest as the Tax Court never redetermines interest in fixing the amount of the deficiency. She states that upon the amount fixed by the Tax Court (which cannot include deficiency interest), interest is collected from the date of the jeopardy notice and demand to the date of notice and demand after the redetermination by the Tax Court has become final, and that Section 297 provides that additional interest on these amounts may be collected

only from the date of notice and demand after the Tax Court's decision has become final. She concludes from this that Section 297 does not authorize any compounding of interest prior to the notice and demand which follows the Tax Court's decision, and that, therefore, delinquency interest on deficiency interest in jeopardy cases (where a petition is filed in the Tax Court) commences at the same point in time as in ordinary assessment cases, that is, after the Tax Court's decision has become final and notice and demand for payment have been issued.

The appellant's argument is based on the erroneous premise that the Tax Court has no jurisdiction to redetermine interest assessable in a jeopardy assessment case. In support of this allegation, the appellant relies on the following cases (Br. 8-9): *Commissioner v. Kilpatrick's Estate*, 140 F. 2d 887 (C.A. 6th); *United States v. Globe Indemnity Co.*, 94 F. 2d 576 (C.A. 2d); and *Fuller v. Commissioner*, 20 T.C. 308. Neither *Kilpatrick's Estate* nor *Globe Indemnity* involved jeopardy assessments. We do not suggest that the Tax Court has jurisdiction to redetermine interest questions in non-jeopardy cases. Until the deficiency is assessed, there can of course be no determination and assessment of interest (see Section 292(a)), and since in non-jeopardy cases the deficiency assessment cannot be made prior to the Tax Court's decision becoming final, in such cases the subject of interest is not a proper one for redetermination by the Tax Court. See *Commissioner v. Kilpatrick's Estate*, *supra*, p. 888. However, where, as

here, the Tax Court proceedings follow a jeopardy assessment, in accordance with Section 273(a), interest on the tax deficiency has already been assessed, and Section 273(c), Appendix, *infra*, provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith." The cases clearly hold that a redetermination with respect to interest may be made by the Tax Court where review by the Tax Court follows a jeopardy assessment. See *Ginsburg v. United States*, *supra*; *Signal Gasoline Corp. v. United States*, 46 F. Supp. 276 (S.D. Calif.); *Riss & Co. v. Commissioner*, 45 T.C. No. 21.⁵ See also 10 Mertens, Law of Federal Income Taxation, *supra*, Sec. 55.03. Contra, *Crolich v. United States*, *supra*.

As the First Circuit stated in *Ginsburg v. United States*, *supra*, p. 473:

Appellants do suggest, however, that "the amount which should have been assessed" (section 273(i)) is limited to the deficiency because, they claim, the Tax Court has no jurisdiction over interest. This may well be true with regard to

⁵In the *Riss* case, the Tax Court distinguished its decision in *Fuller v. Commissioner*, *supra*, as follows:

In *G. E. Fuller*, 20 T.C. 308 (1953), the deficiencies and interest had been assessed prior to the filing of our opinion therein, presumably under the jeopardy provisions. Although we held (at page 318) that we had no jurisdiction over a question concerning interest, it does not appear that our attention had been directed to Section 273(c) of the 1939 Code. Indeed, as we stated in our opinion, the question of interest was not discussed on brief. Thus, we do not deem our decision in that case to be controlling on the question of jurisdiction.

deficiencies determined and assessed in the normal manner under section 272. See *Commissioner of Internal Revenue v. Kilpatrick's Estate*, 6 Cir. 1944, 140 F. 2d 887. But section 273(c), dealing with jeopardy assessments, specifically provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency *and of all amounts assessed at the same time in connection therewith.*" (Italics supplied.) This is to be compared with the more limited language of section 272(c), applicable to normal deficiency proceedings. Also compare section 273(i), "Collection of unpaid amounts," with section 272(b), "Collection of deficiency found by Tax Court," which further points up the distinction between jeopardy-assessment procedure and normal deficiency procedure.

Once it is recognized, as the cases hold, that the Tax Court may redetermine interest in jeopardy assessment cases, it can readily be seen that the amount fixed by the Tax Court, upon which interest is to be calculated pursuant to Section 297, includes deficiency interest from the date the tax was originally due to be paid until the date of the redetermined jeopardy assessment, and thus, the interest imposed on this amount, from the date of the jeopardy notice and demand to the date of notice and demand following the decision of the Tax Court, results in a compounding of interest like the result which is obtained under Section 294(b). See *Ginsburg v. United States*, *supra*; *Signal Gasoline Corp. v. United States*, *supra*. See also 10 Mertens, *Law of Federal Income Taxation*, *supra*, Sec. 55.07.

CONCLUSION

The judgment of the District Court is correct and should be affirmed.⁶

Respectfully submitted,

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June, 1966.

⁶It was agreed by the parties that the arithmetical computations of the amounts of accrued interest on assessed deficiency interest paid by the appellant to be refundable for each account involved in this action, together with the dates of such payments and the interest thereon which the appellant also claims to be refundable, would be determined, verified and settled by and between counsel if required under the decision of the District Court. In the event that counsel could not agree upon such computations, the amounts were to be settled by the District Court upon application and ten days notice. (R. 45.) Therefore, should this Court disagree with the holding of the District Court, then this case should be remanded to that court so that the computations may be made.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN M. YOUNGQUIST,
Assistant United States Attorney.

(Appendix Follows)

Appendix.

Appendix

INTERNAL REVENUE CODE OF 1939

Sec. 272 [As amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. Procedure In General.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(2) *Cross references.*—For exceptions to the restrictions imposed by this subsection, see—Subsection

(d) of this section, relating to waivers by the taxpayer;

Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

Section 273, relating to jeopardy assessments;

Section 274 relating to bankruptcy and receiverships; and

Section 1145, relating to assessment or collection of the amount of the deficiency determined by the Tax Court pending court review.

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Sec. 273. Jeopardy Assessments.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

(c) *Amount Assessable before Decision of Tax Court.*—The jeopardy assessment may be made in re-

spect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 272(f) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with The Tax Court of the United States. The Commissioner may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Commissioner shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

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(f) *Bond to Stay Collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section

297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Tax Court is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

(g) *Same—Further Conditions.*—If the bond is given before the taxpayer has filed his petition with the Tax Court under section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

* * * *

(i) *Collection of Unpaid Amounts.*—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed,

then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

* * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Sec. 292 [As amended by Sec. 2, Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. Interest On Deficiencies.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * *

(26 U.S.C. 1952 ed., Sec. 292.)

Sec. 293. Additions To The Tax In Case Of Deficiency.

(a) *Negligence*.—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud*.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d) (2).

(26 U.S.C. 1952 ed., Sec. 293.)

Sec. 294. Additions To The Tax In Case Of Non-payment.

* * * *

(b) *Deficiency*.—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and

demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of Jeopardy Bond.*—If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bonds.

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(26 U.S.C. 1952 ed., Sec. 294.)

Sec. 297. Interest In Case Of Jeopardy Assessments.

In the case of the amount collected under section 273(i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273(i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273(i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.

(26 U.S.C. 1952 ed., Sec. 297.)

